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## THE DUKE RAPE CASE FIVE YEARS LATER: LESSONS FOR THE ACADEMY, THE MEDIA, AND THE CRIMINAL JUSTICE SYSTEM

*Dan Subotnik\**

If engagement is the first step in healing,  
then the second is pure unadulterated struggle.  
We will never achieve racial healing if we do not confront  
one another, take risks. . . say all the things we are not  
supposed to say in mixed company.

Harlon Dalton<sup>1</sup>

If the Tawana Brawley case was the race/law media sensation of the 1980s, that distinction later passed to the Central Park Jogger case, then to the O. J. Simpson case, and in the most recent decade, to the Duke Rape case. Reprising the first case with its black complainant and white suspects,<sup>2</sup> the last case, according to one-time New York Times

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1. HARLON DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES 97 (1995) (after highlighting the sterility of contemporary interracial dialogue). Dalton is an emeritus professor of law at Yale.

2. The parallels are striking. A young black woman claims to have been raped and racially humiliated by white men, even though no sex, much less rape or other abuse, is ever proved. A racial blow-out ensues that shakes the nation. Here is Reverend Al Sharpton’s harangue on the epistemology of race before a large crowd at Bethany Baptist Church in Brooklyn:

If Tawana was a white girl, you wouldn’t make us prove how the crime happened. But because she’s black she has to prove herself . . . The fact that you’ve got five hundred people in this room and every one of them has a different complexion means that white rape is a reality in the United States.

Public Editor Daniel Okrent, was the stuff of journalists' dreams: "white over black, rich over poor, athletes over non-athletes, men over women, educated over non-educated. Wow."<sup>3</sup>

The 2006 incident and its aftermath inspired three books that came out the following year while the story was still hot but before the smoke had all cleared.<sup>4</sup> The time that has since passed allows for a more comprehensive evaluation of the cultural meaning of the Duke Rape case. This is the goal of the newly released "Institutional Failures,"<sup>5</sup> which constitutes a point of departure for this review. The aim of this article is first to clarify the contribution this book makes to an understanding of the case. I will describe and analyze the content of the nine essays that make up the book; I will make reference to related works, and I will offer a concluding evaluation of the book's likely impact.

I will deal with all the essays, but believing as I do that some are more important to most readers than others—though all are well wrought—I do not give them equal attention. Believing, furthermore, that the organization of the book is its most distinctive and potentially illuminating aspect, I have retained its categories in the structure of my own essay: the academy, the media, the criminal justice system, and the academic sports complex. Where it seems that readers require additional information or analysis to make sense of the case, I shall provide it, often by referring to the original books on the subject.

The conclusions I draw in this *review essay*, however, will stem only partly from this plan. They also depend on a second level at which "Institutional Failures" figures in this piece. This book provides a base

ROBERT D. MCFADDEN ET AL., *OUTRAGE: THE STORY BEHIND THE TAWANA BRAWLEY HOAX* 310 (1990) (quoting Sharpton).

It will be an all-out war between the raped and the rapists in American history. Tawana Brawley will be the last known black rape victim . . . It's a war that's been building for four hundred years. Now the raped have decided to enter the battlefield and war with those who cover up the rape.

*Id.* at 324 (quoting Sharpton).

3. See Rachel Smolkin, *Justice Delayed*, *AMERICAN JOURNALISM REVIEW*, Aug./Sept. 2007, <http://www.ajr.org/article.asp?id=4379> (last visited Oct. 16, 2011) (quoting Okrent).

4. STUART TAYLOR, JR. ET AL., *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* (2007); DON YAEGER ET AL., *IT'S NOT ABOUT THE TRUTH: HOW POWER, PREJUDICE, RACISM, AND POLITICAL CORRECTNESS OVERSHADOWED TRUTH AND JUSTICE IN THE DUKE LACROSSE RAPE CASE* (2008); NADER BAYDOUN ET AL., *A RUSH TO INJUSTICE: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED* (2007). With an excellent index, the first of these books is the most user friendly.

5. *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* (Howard M. Wasserman ed., 2011).

on which to develop my own analysis of the roots and significance of the Duke Rape case and is the product of years of studying legal scholarship on race and gender. Some of the ways in which I evaluate and contextualize the case may strike some readers as startling, and, at least initially, terribly misguided. Indeed, because the institutional failures described in this book are largely the products of hype, self-delusion, and obfuscation—which are undergirded by very strongly-held views—elements of my discussion may make some readers uncomfortable. For these potential stumbling blocks, I can do no more here than to ask readers to withhold judgment until they have given my take on the case a full and open-minded hearing.

Although, in the end, the truth in the Duke Rape case did come out. “Institutional Failures” testifies to the immense damage wrought by the failure of three systems of control: the University, the media, and the criminal justice system. The University failed to protect its students from a mob demanding quick justice. The media reflexively bought the narrative of pampered white student athletes run amok. The criminal justice system failed to accord defendants the basic protections offered by North Carolina rules of criminal procedure. Each of these failures, we learn, compounded the others.

Preceding these failures was another one that made the rest of the story possible: just as universities generally fail to rein in their out-of-control student athletes, here Duke failed to control those participating in a strip show-turned-Dionysian-scene. If, as it is said, we “learn more from failure than success,” the story should be an educational gold mine. And so it is.

A discussion of this nature requires agreement on the basic facts. Because these will be unfamiliar to some, I now set them forth.

### THE BASICS

On March 13, 2006, a co-captain of the Duke Lacrosse team organized an off-campus party for the team inviting two strippers for entertainment. He was told to expect one white and one Hispanic woman, but two black erotic dancers showed up. After circumstances that remain in dispute, one of the dancers, Crystal Magnum, claimed that she had been raped. The 27 year-old mother of two also claimed that she had been subjected to verbal racial abuse, including: “Let’s fuck

these black bitches. We are going to fuck you black bitches.”<sup>6</sup> Soon thereafter, despite claims of innocence, two Duke athletes were arrested for kidnapping and rape. Supporting Mangum and protesting against the alleged crime, some students on campus began carrying “wanted” posters of the accused and signs reading “CASTRATE,” and at a rally on March 25, faculty and students called for punishment of the guilty parties.<sup>7</sup>

When problems arose with respect to questionable identifications and contradictions in some of the complainant’s statements, 46 of the 47 team members were called in to provide DNA.<sup>8</sup> All complied. On April 10, a report came back that none of the DNA found on the complainant matched that of any of the players. The prosecutor, Durham District Attorney Michael Nifong, kept this information secret, went ahead with the investigation, and after making a variety of inflammatory statements, secured indictments on April 17 against two and, later, three lacrosse players. Duke thereupon suspended the three students, cancelled the lacrosse season, and fired the coach. Months later, when the case was falling apart, Duke invited the players back and still later, in April, 2007, the North Carolina Attorney General, who had taken over the case, dismissed all charges against the students and, indeed, in an almost unprecedented move, declared them innocent.

Presumably concerned about a lawsuit for refusing to support its student athletes against demonstrably false accusations, the University entered into a major settlement with the defendants.<sup>9</sup> Additional suits have since been filed by the indicted players and other members of the lacrosse team against the City of Durham under 42 U.S.C. § 1983, alleging violations of their civil rights.<sup>10</sup> These are unresolved as of this writing. In June 2007, Nifong was disbarred for “dishonesty, fraud,

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6. See BAYDOUN, *supra* note 4, at 4 (quoting Mangum’s report to police). One of the boys reportedly offered to use a broomstick on the girls. *Id.* at 13. Another reportedly yelled “Nigger” at the girls. *Id.* at 14.

7. K.C. Johnson, *The Perils of Academic Group Think*, INSTITUTIONAL FAILURES 67, 71, 18 (Howard M. Wasserman ed., 2011).

8. The lone African American on the team was not tested because the accuser identified her assailants as white.

9. See Wasserman, *supra* note 5, at 20. See *infra* note 173 and accompanying text for more on the settlement.

10. Section 1983 is an important tool for vindicating constitutional protections against government entities. For more on this, see Sam Kamin, *Duke Lacrosse, Prosecutorial Misconduct, and the Limits of the Civil Justice System*, INSTITUTIONAL FAILURES 43, 54-55 (Howard M. Wasserman ed., 2011). Some of these suits are also against Duke but that is not relevant for our purposes here.

deceit and misrepresentation” in his handling of the case,<sup>11</sup> and on August 30, 2007, was sentenced to a day of jail time for contempt of court. Mangum was never prosecuted for her false rape charge. The attack on the institutions in question by *Institutional Failures* is so stark, particularly in its race and gender dimensions, that a fair-minded academic having any familiarity with the culture wars over the years must be skeptical. Is there no other side to this story? Were the students athletes at least arguably guilty? Apparently not. From the available literature both then and now, the only thing disinterested readers can go by, it was the institutions in question that were guilty—and beyond a reasonable doubt. Seeing them pay the price makes reading “Institutional Failures” unusually satisfying.

For a book to be productive as well as satisfying, however, it must do more than beat up on obvious wrongdoers. It must focus attention on the institutional pillars of our society so that they can be strengthened and stand up better to stress next time around. Does the book achieve that end?

Where to start? Among the sins of the University, the media, and the criminal justice system, the editor and lead author, law professor Howard Wasserman, suggests—without spelling out his reasoning—those of the University may be most egregious.<sup>12</sup> In this respect he is surely right.

Jumping on the accusation bandwagon three weeks after the incident in question and after denials of culpability but before the defendants had been indicted, members of the Duke community, mostly faculty (the “Group of 88”), took out an advertisement in *The Chronicle*, Duke’s daily paper. Untitled, and obviously responding to Mangum’s claim to have been racially abused—about which more later—it read in relevant part:<sup>13</sup>

Regardless of the results of the police investigation, what is apparent everyday [sic] now is the anger and fear of many students who know themselves to be objects of racism and sexism, who see illuminated in this moment’s extraordinary spotlight what they live with everyday. They know it isn’t just Duke, it isn’t everybody and it isn’t just individuals making this disaster.

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11. See *Mike Nifong Disbarred over Ethics Violations in Duke Lacrosse Case*, FOXNEWS.COM, <http://www.foxnews.com/story/0,2933,283282,00.html> (last visited Oct. 28, 2011).

12. See Wasserman, *supra* note 5, at 9.

13. *What does a Social Disaster Sound Like?: Paid Advertisement*, THE CHRONICLE, DUKE UNIVERSITY, Apr. 6, 2006.

**What Does a Social Disaster Look Like? (sic)**

We're turning up the volume in a moment when some of the most vulnerable among us are being asked to quiet down while we wait.

The students know that the disaster did not begin on March 13 and won't end with what the police say or the court decides. Like all disasters, this one has a history. And what lies beneath what we're hearing from our students are questions about the future.

The ad quoted students:

We go to class with racist classmates, we go to gym with classmates who are racists. . . . It's part of the experience.

I was talking to a white woman who was asking "why do [black] people. . . make race such a big issue." They just don't get it.

We want the absence of terror. But we don't know what that means. . . . We can't think. . . . That's why we're silent. Terror robs you of language and you need language for the healing to begin.<sup>14</sup>

To protests like these, the ad responded: "To the students speaking individually and to the protestors making collective noise, thank you for not waiting and for making yourselves heard."<sup>15</sup>

From this preemptive and poisonous strike, which incited the Duke community to view one allegedly racial incident as evidence of a terrifying social problem—and which almost no Duke faculty member or administrator objected to—the matter became a cause célèbre. Drawing out the story's implications, Group of 88 leader, Professor Wahneema Lubiano, called on Duke to begin "targeted teaching" to expose "the structures of racism and the not-so-hidden injuries of class entitlement in place at Duke and everywhere else in this country, [beyond] banal and ordinary sexual harassment."<sup>16</sup>

That the University was a prime mover chronologically, however, is not the only reason for inculcating Duke here. As the destination of our most successful students, universities enjoy enormous prestige in our society. Though every institution exerts influence on others, the academy would seem to influence the other institutions in question here much more than vice versa. This notion cannot come as a surprise. It is the function of the academy to critique the society around it, not the

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14. *Id.*

15. *Id.*

16. See Johnson, *supra* note 7, at 78 (quoting Lubiano).

other way around. Journalists and lawyers have all sat in classrooms taking in the words of their professors; the latter do not reciprocate the respect. Only professors get tenure.

Unlike the academy—and this may further explain its singular prestige—the other institutions have built-in weaknesses in the form of conflicting goals or incentives, which make some failure inevitable. For example, whatever its obligation to ferret out the truth, the media earn their stripes by being the first with the sensational story, one preferably involving violence. This is where the sales and page views are. Fair and balanced reporting does not typically pay the bills.

With regard to the criminal justice system, the internal contradiction lamented in this volume is that prosecutors often get credit by the public for being tough on lawbreakers, which strengthens the community's sense of security, but not for upholding defendants' rights or their own obligation to do justice. A prosecutor in the middle of an election campaign, as Nifong was here, is reluctant to ignore public opinion.

College sports are an area of the academy that features perhaps the clearest conflict. It stems from the fact that sports build teamwork and unify the campus, bringing excitement, recognition and money (sometimes huge amounts of it) to the university in the process—especially when the teams are winning.<sup>17</sup> Thus, even though universities are not infrequently embarrassed by excesses in student athletes' behavior—to say nothing about their academic performance—in a highly competitive sports setting, university administrations cannot be seen as leaning too hard on athletes. Any rigorous or special restrictions on athletes would likely undermine recruiting efforts. If and when it becomes known that you cannot have fun at Duke playing lacrosse, Duke lacrosse is done.

In sum, conflicting goals and incentives make scandals inevitable in the media, criminal justice, and academic sports domains. What about the academy? In the last fifteen years or so, to be sure, two goals have driven much university behavior: excellence and diversity. Even in a post-deconstruction era where we understand that individuals and

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17. We learn here that even in high visibility sports such as football in the big-time college sports programs, direct expenses exceed direct income. See Craig LaMay, *Covering the Notorious Case*, INSTITUTIONAL FAILURES 167, 176-77 (Howard M. Wasserman ed., 2011). Former Harvard President Derek Bok is highly dubious about whether when taking into account capital costs, big-time sports programs make money even taking into account alumni contributions. See DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 38-39, 49 (2004).



institutions have multiple “selves,” it is difficult to see how two different goals can function simultaneously as primary goals.<sup>18</sup> For all the talk of the two going hand in hand, a tension exists between them to the extent that affirmative action seeks to bypass respected measures of excellence and, more generally, to the extent of disagreements about the relative weight to be given to standards based on identity and subjectivity as opposed to universality and objectivity. These tensions go to the very heart of this paper, as the Group of 88 was clearly influenced by the identity of the complainant and that of the alleged victimizers.

Even suggesting the existence of a tension between excellence and diversity, however, is a challenge to a central tenet of academic liberalism, so let me carefully and frankly document the point.<sup>19</sup> Among the most deeply troubling aspects of law school life for those of us concerned with issues of equality is that African American students are not competitive with their white counterparts.<sup>20</sup> The average black law student substantially underperforms the average white student in terms of first-year GPA<sup>21</sup> at law schools in all tiers and there seems to be no evidence that the gap closes in subsequent years.<sup>22</sup> There is, sadly, no way around it. The tension between excellence and diversity, as it plays out in contemporary academic life, is enormous and eliminating the gap must be a priority of the highest order.<sup>23</sup>

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18. I do not want to simplify here. There are other goals. For example, the university has the obligation both to treat its students fairly and to protect its reputation. I do not see this as a fundamental conflict in the same way. For a discussion of how Duke could and should have treated the tension created by these conflicting obligations, see text *infra* between notes 81 and 82.

19. At a faculty workshop at which an earlier draft of this paper was presented, two colleagues independently said that they were inclined to put down the draft upon the suggestion that the two goals were not consistent with one another.

20. Professor Richard Delgado, seeming to accept this point, has argued (through his famous fictitious characters) that it is the result of racism in our law schools. See Richard Delgado, *Rodrigo's Riposte, The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637, 641-44 (2007). Delgado, Professor Rhonda Magee, and I discussed the argument extensively in a series of symposium articles in the 2008-09 University of San Francisco Law Review.

21. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 426-27, 430-31 (2004) (citing Linda F. Wightman, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY (1998)).

22. To accept the existence of the disparity is not, I hasten to add, to reject affirmative action.

23. In admission circles, to be sure, excellence may reasonably be measured by amount of progress made from a lower base. Thus, those coming from disadvantaged backgrounds may show excellence by overcoming family illiteracy, single parenthood, or perhaps a criminal record. In general, however, academic excellence is measured in more absolute terms, i.e., through grades. Although maybe they should, law schools do not bestow awards to the most academically improved students.

For all this tension, Harvard's historical goal, reflected in a motto long in effect, remains "Veritas," not "Diversitas." If pushed to make a choice, and go public with it, the rest of the academy would presumably agree.<sup>24</sup> Can the tension between the new and historical objectives be reconciled? I think yes. One can conclude, at least provisionally, that excellence and diversity can both operate in the service of *Veritas*. On this assumption, in any event, the absence of a compelling competing interest to *Veritas* explains, again, why I ascribe to Duke the largest share of the blame here. It also explains why I begin with and give Duke most of my attention.

### THE ACADEMY

#### *The Group of 88*

How should one understand the statement by the Group of 88 that linked the incident to "everyday" occurrences at Duke and elsewhere, thereby poisoning the climate for the student athletes both on campus and very possibly in the district attorney's office? Essayist K.C. Johnson touches on this in his excellent essay, "The Perils of Academic Groupthink," and more extensively in his book.<sup>25</sup> Because I believe even more needs to be said for an understanding the Group of 88 ad, particularly for younger readers, I need to add some academic history here. In brief, I ask, what is the origin of the Groupthink in which white males become the reviled community?<sup>26</sup> After giving my take on this question, and after analyzing the reaction of the Group of 88 and the rest of Duke faculty to Mangum's account of the rape, I come back to her charge of verbal racial abuse.

We must recall that until the 1970s, women and minorities were unwelcome in much of academia as students, much less as instructors. To overcome the bias against them, these groups had to persuade establishment forces that they could perform every bit as well as white males. This argument, which quickly proved successful at the student level, could advance their cause only so far in the professorial realm.

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On another level, it may be that grades do not correlate with success in the professional world. But if law schools and law professors truly believe this, they should be telling their students so explicitly. Otherwise downplaying grades in support of affirmative action is not credible.

24. If "diversity" is the motto of any school other than perhaps a historically black college, I am not aware of it.

25. See Johnson, *supra* note 7, at 78.

26. The following few paragraphs summarize a substantial literature, some examples of which are listed *infra* note 35.

Competition from white men being intense, the argument, let me suggest, could not provide the edge in hiring that was needed to get large numbers of new group members the academic jobs they sought.

To solve that problem, another argument began to be heard, to wit, that the psychological make-up of women and minorities was so different from white men that their interests could not be represented by these men. Women and minority academics in this view needed both to address group concerns that for so long had been either deliberately or inadvertently ignored by men *and* to serve as role models for the new crop of students who were being admitted to higher education. One can see a basis for affirmative action here: women and minorities in this theory needed to be hired *in preference to* men.

For many, the historical sexism and racism that kept women and minorities out of the academy meant furthermore that these groups had to have the autonomy to pursue their own agendas without interference. History, sociology, and political science, for its critics, were too wedded to establishment values. Out of this thinking was born the idea of African American, Latino, Asian, and women's studies departments.

Nothing in the foregoing account, including the push for preferential treatment, should be read to mean that women and minorities were wrong to fight for and win a place for themselves; these groups had been marginalized in America's self-consciousness and strong medicine was needed. The problem, it can be argued, lay in the change in the concurrent self-definition of the scholar—a definition inseparable from the troubling and previously discussed conflict within the university to produce excellence (truth) on the one hand, and to support identity (diversity) on the other.

For what it is worth, the change in my mind is tied to several epistemological pronouncements over the years by prominent minority law professors. "Minority status," writes Richard Delgado, "brings with it a presumed competence to speak about race and racism."<sup>27</sup> "I would . . . give special credence to the perspective of the subordinated," writes Asian American law professor Mari Matsuda.<sup>28</sup> So when Crystal Mangum's word is pitted against that of the white lacrosse players, even on what would appear to be a factual matter, the rest of us know who is more credible. Feminist scholar Joan Williams put the matter most clearly some ten years ago. Representing, I believe it is fair to say, the

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27. RICHARD DELGADO ET AL., *CRITICAL RACE THEORY: AN INTRODUCTION* 9 (2001).

28. Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764 (1990).

thinking of those who put identity first, her words came back to me as if through tinnitus during discussions of the Duke Rape case: “my goal is not to deliver the truth but to promote social change.”<sup>29</sup> There are, to be sure, various ways of interpreting this phrase. At the very least, however, it suggests that as between the truth, as it is perceived by the speaker, and the desire to empower his or her group, the latter *must* predominate.<sup>30</sup>

Williams is raising an issue of fundamental importance for the academy here: are we advocates or dispassionate scholars, i.e., judges? In effect adopting the former role, Williams is acting like a lawyer, which she is. The problem with this posture is that lawyers play out their role in an adversary system where opposing sides have an opportunity to be heard and a neutral judge is authorized and trained to decide matters.<sup>31</sup> When simultaneously playing the role of advocate and judge, advocate/judges preclude fair-mindedness and the public turns cynical. When this is combined with denial of a conflict between excellence and diversity, previously discussed, you have the basis for our often-maligned American talk-radio culture.

We should perhaps refrain from blaming gender or race critics too much for wanting to lift up their own groups, bringing down those above them in the process. The desire is surely rooted in human nature.

[U]nless inhibited, every person and group will tend toward beliefs and practices that are self-aggrandizing. This is certainly true [not only] of

29. JOAN C. WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 244 (2000).

30. The skeptical reader may need an illustration for the conceptual problem I identify. Consider: approaching me after a presentation on identity scholarship, a colleague asked how I could be sure that if feminists did not “embellish” the truth, women would have *any* standing in law schools today. Because everyone has a cause near and dear, this question would have brought a big smile of recognition to the face of the famed economist Joseph A. Schumpeter. “The first thing a man will do for his ideals,” he wrote, “is lie.” See Thomas Sowell, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES 59 (2007) (quoting Schumpeter). The answer to my colleague’s question, of course, is that we cannot know for sure. But if we come to accept that every assertion is a misrepresentation for some higher cause, the result would be anarchy. In such a setting, not only would humankind have no future; we could “devolve.” You don’t have to be a scholar to understand the importance of good faith discourse. In fact, it is probably better that you not be a scholar and have real responsibilities. “But unless some day somebody trusts somebody,” a wise old “king” taught a half-century ago, “there’ll be nothing left on earth ‘excepting’ fishes.” See RICHARD RODGERS ET AL., THE KING AND I: A PUZZLEMENT, *available at* <http://www.songlyrics.com/the-king-and-i/a-puzzlement-lyrics/> (last visited Oct. 28, 2011).

31. No judge has been appointed to decide most matters of social concern, for example, whether, as Williams has put it, the 60-hour work week for contemporary big-law firms needs to be scrapped because it deprives women with family responsibilities of the opportunity to participate fully in law firm life. See WILLIAMS, *supra* note 29.

those who inherit a dominant status. . . . Surely one of the most striking features of human dynamics is the alacrity with which those who have been oppressed will oppress whomever they can once the opportunity presents itself.<sup>32</sup>

At any rate, in an environment in which being excluded has served to empower “vulnerable populations,”<sup>33</sup> to use a term much in vogue in academia today, and where by extension, any claimed blow against these groups can be used as blow *for* them, critics will look for oppression. And in keeping with the “favorite thesis” hypothesis, critics will ignore evidence contradicting the oppression: *cui mal cerca, mal trova* (those who seek evil will find it).

Could it be otherwise given the enormous payoff earned by identity scholars? To this day a strident and not insignificant number of our race and gender critics, “identity scholars,” spend their days scouring the cultural terrain looking for an offending “ism.”<sup>34</sup> In addition, when 200 million adults living in the United States intersect in person and through the media, and when behavior and language can be understood and misunderstood in so many different ways, teaching and preaching opportunities will abound.

To be sure, organized and especially capitalist societies, not least our own, need the tireless and selfless efforts of warriors who, lance at the ready, seek opportunities to liberate others. The rub is that from a vantage point high on their horses, would-be pro bono knights in the American La Mancha can make out only evil giants and the weak, especially damsels in distress. By recklessly dividing the nation into heroes—themselves—victimizers, and vulnerable populations, modern

32. Randall Kennedy, My Race Problem—and Ours, ATLANTIC MONTHLY (May 1997), available at <http://www.theatlantic.com/past/docs/issues/97may/kennedy.htm> (last visited Oct. 16, 2011). Kennedy, who is black, is a professor of criminal law at Harvard.

33. The reader might want to imagine an experiment in which an American academic enters an inner city community and asks the first person whether he or she is a member of a “vulnerable population.”

34. A large literature captures this. See, e.g., PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); PATRICIA J. WILLIAMS, THE ROOSTER’S EGG (1995); FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002); RICHARD DELGADO ET AL., CRITICAL RACE THEORY: AN INTRODUCTION (2001); LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE (1997); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995); JUDITH A. BAER, OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE (1999); LINDA HIRSHMAN & JANE LARSON, HARD BARGAINS, THE POLITICS OF SEX (1998); Richard Delgado, *Rodrigo’s Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637 (2007); DERRALD WING SUE, OVERCOMING OUR RACISM: THE JOURNEY TO LIBERATION (2003).

day Don Quixotes inflate their self-importance, feed their self-righteousness, undermine individual responsibility by promoting self-pity, impale innocents, and, in so doing, shred the social fabric.<sup>35</sup> In this setting, inevitably, “Things [will] fall apart; the centre cannot hold.”<sup>36</sup>

If all this is too abstract, let us suppose that a white male steps on a black woman’s toe. Can we agree that it may be no one’s fault or *may* even be the woman’s fault, because, say, she was simply not looking where she was going? The committed identity scholar will not admit to that possibility even if it may mean that the black woman’s toes will continue to be squished. This is because the identity scholar’s goal is, I suggest, not primarily to help black women avoid pain; no historical understanding of women’s and minorities’ pain is necessary, after all, to prescribe two aspirin and urge black women to watch their step next time. Such a prescription does nothing to enhance the funding for and power of those in our “specialty” departments relative to others. So the man must be guilty of a battery, or in our case, rape, and in the Tawana Brawley case, where all evidence suggests that Brawley smeared herself with excrement and wrote racist words on her own body, critical race theorist and law professor Patricia Williams could explain: “Even if she did it to herself . . . Her condition was . . . the expression of some crime against her, some tremendous violence, some great violation that challenges comprehension.”<sup>37</sup> What was beyond Williams’ and others’ comprehension under the circumstances was the *possibility* that she might have done it to herself so that she would not be beaten by her mother’s boyfriend for failing to come home one night.

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35. See DAN SUBOTNIK, *TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA* (2005); Dan Subotnik, *Are Law Schools Racist?: A “Talk” with Richard Delgado*, 43 U.S.F. L. REV. 227 (2008) (responding to Richard Delgado’s piece, *supra* note 20); DANIEL FARBER ET AL., *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997); DAPHNE PATAI ET AL., *PROFESSING FEMINISM: EDUCATION AND INDOCTRINATION IN WOMEN’S STUDIES* (2003); RICHARD BERNSTEIN, *DICTATORSHIP OF VIRTUE: MULTICULTURALISM AND THE BATTLE FOR AMERICA’S FUTURE* (1994); ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (1990); ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* (1998); KENNETH LASSON, *TREMBLING IN THE IVORY TOWER: EXCESSES IN THE PURSUIT OF TRUTH AND TENURE* (2003); RICHARD T. FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008). Thomas Sowell refers to people with this felt “state of grace” as the “anointed” and has written an entire book devoted to them. See THOMAS SOWELL, *THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY* (1995).

36. W. B. Yeats, *The Second Coming* (1919), available at <http://www.potw.org/archive/potw351.html> (last visited Oct. 20, 2011).

37. See Richard Thompson Ford, *What is the Race Card?*, BEST AFRICAN AMERICAN ESSAYS 2010, at 236 (Gerald Early et al. eds., 2010) (quoting Williams). Ford Teaches at Stanford Law School.

Admittedly, this will sound harsh, perhaps even farfetched, and yet, consider a foundational document for an influential movement in minority circles called critical race theory. This school of thought, say some of its charter members, “recognizes that racism is endemic to American life” and, seeking to expose that racism, “[c]hallenges ahistoricism and insists on a contextual/historical analysis of the law.”<sup>38</sup> The Duke Rape incident could not exist outside of history, could not be *sui generis*. For critical race theorists, fixation on the past is an occupational hazard; for them, “the past is never dead,” as William Faulkner famously put it, “[i]t’s not even past.”<sup>39</sup>

For identity scholars, it seems, white males must be inculcated, not identity group members themselves. When identity scholars refer to “social change,” they seem to mean a sweeping change in white male behavior towards women and minorities. If the demand for such a change means that white males will decide to keep clear of women or black people, say by not hiring them, that decision will only prove the case of animus and lead to additional demands for special treatment.

Am I stereotyping, i.e., focusing attention on the academy in general and not specifically on Duke? Consider Group of 88 signatory, former Dean of Humanities and Social Studies, *and* law professor Karla Holloway’s simple jurisprudential equation: “White innocence means black guilt. Men’s innocence means women’s guilt.”<sup>40</sup> The accused lacrosse players had to be guilty. For his part, black English professor Houston Baker—whom we will return to—chastised Duke only two weeks after the event in question for failing to take “decisive and meaningful action” against the lacrosse players.<sup>41</sup> That team was the “embodiment of abhorrent sexual assault, verbal racial violence, and drunken white male privilege loosed amongst us.”<sup>42</sup> Justice required that Duke defer to women’s and African American departments and

recogniz[e] that the academics and departments that work assiduously to impart the best ethical and intellectual wisdom of their disciplines, which are always race, class, and gender inflected, are the most marginalized and underappreciated among high administrative personnel and across all academic domains.<sup>43</sup>

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38. MARI J. MATSUDA et al., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 6 (1993).

39. WILLIAM FAULKNER, REQUIEM FOR A NUN, ACT I, SCENE 3 (1968).

40. See BAYDOUN, *supra* note 4, at 108.

41. *Id.* at 96.

42. See TAYLOR, *supra* note 4, at 141 (quoting Baker).

43. See Johnson, *supra* note 7, at 74 (quoting Baker).

Because the incident at the heart of the Duke Rape case was the perfect storm for identity scholars—involving as it did the charge of a most intimate and hateful violation—it should not surprise readers that the Group of 88 ad was signed by 80% of the African American Studies faculty, 72% of the Women’s Studies faculty, and 60% of the cultural anthropology faculty.<sup>44</sup> There was nothing random in these data. To contextualize, no one in economics, engineering, or business signed on. It is possible, of course, but unlikely, that these faculty members were not asked. The broader the range of signatories, the more powerful the document would have been.<sup>45</sup> The ad was political.

Did these non-signatory faculties not care about black sexual assault victims on campus? Or, paradoxically, did a lack of formal training in group (i.e., identity) psychology just make them better at evaluating what little evidence there was at the time of the ad? If the latter, it cuts against the idea that the public is best served when women and minority academics have their own departments.<sup>46</sup>

Instinctive support of Mangum and by extension all women and minorities in principle is one thing. We turn now to the explicit claim of the Group of 88, that sexual and racial abuse was rampant on campus. It turns out that while 3% of women college students are subject to sexual assault annually, a significant and frightening datum,<sup>47</sup> on the Duke campus itself, only 1/10 of one percent are so attacked, a rate that is 1/30 of the more general rate.<sup>48</sup> If this is not what the Group of 88 was complaining about, what was its complaint?

The foregoing does not, admittedly, explicitly address the racial element. So one should ask: was Crystal Mangum an unfortunate victim of what has come in academic circles to be called “intersectionality,” in this case, the exponential burden of being simultaneously female and black?

This was, indeed, a major theme in the early analyses of the case. Three weeks before the first indictment, before statements were made by the lacrosse students, Houston Baker, a member of the Group—Gang?—of 88, wondered publicly:

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44. *See id.*

45. We know, furthermore, that 25 to 50% of faculty from art, romance studies, literature, English, and history did sign. *See id.*

46. An old criticism of these departments is that they encourage self-affirmation at the expense of self-criticism.

47. *See LaMay, supra* note 17, at 178.

48. *See Johnson, supra* note 7, at 86. *But see infra* note 168 and accompanying text.



How soon will confidence be restored to our university as a place where minds, souls, and bodies can feel safe from agents, perpetrators, and abettors of white privilege, irresponsibility, debauchery and violence? Surely the answer to this question must come from the immediate dismissals of those principally responsible for the horrors of this spring moment at Duke.<sup>49</sup>

Baker's call for immediate action bespeaks a personal connection to an alleged crime that on its face involved only white males and a black female. How might he have been drawn so deeply into the fray? Law professor Angela Harris, speaking for many black women, professes that rape has come to "signif[y] the terrorism of black men by white men, aided and abetted, passively (by silence) or actively (by 'crying rape'), by white women."<sup>50</sup> As a black male, in other words, Baker himself was targeted by the "attack" on Mangum.

In any event, while treating the white student athletes as abstractions, who could and should be dismissible without any need to confirm the facts, Baker did not hesitate to explicitly personalize the problem that they and their kind posed for his family:

[M]y wife and many, many, many, women. . . on the campus of Duke this evening are afraid to walk across the campus. . . . In tier-one, traditionally all-white universities across this country.... administrators know that a culture of violence, a culture of rape, a culture of gay-bashing, a culture of racism and misogyny exist.<sup>51</sup>

Baker was not entirely hallucinating about the dangers of Durham, the home of Duke. A high crime rate had led at least one local paper to refer to Durham as the "murder capital" of North Carolina.<sup>52</sup> Though Mangum herself may not have understood them in this way, her allegations were not just about the here and now, and one did not have to be a member of the Group of 88 or an African American to make the connection; one had only to be conscious of American history. "[S]ex and race have always interacted in a vicious chemistry of power,

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49. See Johnson, *supra* note 7, at 70 (quoting Baker).

50. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990).

51. See Robert M. O'Neil, *The Duke Lacrosse Saga: Administration versus Students and Faculty, among Others*, INSTITUTIONAL FAILURES 89, 93 (Howard M. Wasserman ed., 2011) (quoting Baker).

52. See YAEGER, *supra* note 4, at 31. The Mayor himself, who was black, had reported that "the one area that prevents us from being an excellent city . . . is crime." *Id.* (quoting Mayor William Bell).

privilege and control,” William Chafe weighed in,<sup>53</sup> perhaps taking his cue from Reverend Sharpton.<sup>54</sup> Chafe is the former dean at Duke and a nationally prominent authority on African American and women’s history. Duke history professor Timothy Tyson placed the Duke Rape case into the most elaborate historical frame:

The spirit of the lynch mob lived in that house on Buchanan Boulevard regardless of the truth of the most serious charges. The ghastly spectacle takes its place in a history where African American men were burned at the stake for “reckless eyeballing”—that is, looking at a white woman—and white men kept black concubines and mistresses and raped black women at will.<sup>55</sup>

Let us deconstruct this racialized passage with a few questions: first, was Crystal Mangum ogled—i.e. recklessly eyeballed—because she was black? That suggests that a white woman would not have served the purpose. Are white strippers not ogled? Beyond that, we know that the stripping service that supplied the “dancers” first told the party sponsors that the strippers would be white or Hispanic.<sup>56</sup> If the lacrosse team was seeking to reprise a lurid historical scene, why did it not protest? Second, to what extent have white men kept *white* concubines and mistresses and how do the numbers compare? Professor Tyson provides no data. Third, whatever can be said about how white men treated black men fifty-five years ago, is it appropriate to link white men who keep company with black women today to the horrors of slavery<sup>57</sup> or to the violence inflicted on Emmet Till? Nothing comes to mind in support of this notion. Fourth, and most important, to what extent are black women—still—routinely violated by white men?

Happily, good current data is available to answer this last question. Shedding light on the vicious charge that a slave culture lives on in

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53. See Johnson, *supra* note 7, at 71 (quoting Chafe).

54. See *supra* note 1 and accompanying text.

55. See Johnson, *supra* note 7, at 71 (quoting Tyson). Here is the intellectual trap set and fallen into by the critical race theorist. Critical race theory rejects the “ahistorical, abstracted story of racial inequality as a series of randomly occurring, . . . individualized acts.” See MATSUDA, *supra* note 38, at 6.

56. See Johnson, *supra* note 7, at 68.

57. See William Chafe, *Sex and Race*, THE CHRONICLE, DUKE UNIVERSITY, Mar. 31, 2006, at A6. Chafe associated the lacrosse players with “white slave masters [who] were the initial perpetrators of sexual assault on black women” and “white men [who] portrayed black women as especially erotic, more driven to sexual pleasure and expressiveness than white women.” See TAYLOR, *supra* note 4, at 108 (quoting Chafee).

America,<sup>58</sup> they show that if indeed black women are terrified of sexual assault, as Houston Baker claims, it is not because of anything that white males are doing. A racial breakdown of sexual assault in Durham is not available, but according to the latest U.S. Department of Justice figures, the rate of white-on-black rape/sexual assault is *statistically negligible*.<sup>59</sup> Of equal relevance to the issue of fear of white violence against women, African Americans appear to be responsible for more than 80 percent of homicides in Durham.<sup>60</sup> Under these circumstances, even those who are not Freudians can understand the fear of white brutality against black women as just redirected fear.

That Baker could have been elected president of the august, now 30,000-member- strong, Modern Language Association under these circumstances says much about political correctness and self-righteousness in contemporary academic life.<sup>61</sup>

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58. See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 309-10 (2010) (America is a "country still inequalitarian and racially divided because of 'slavery unwilling to die.'"). Feagin is a former president of the American Sociological Association.

59. See U.S. DEP'T OF JUSTICE, *CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES*, Table 42 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus0802.pdf> (Table: Percent distribution of single-offender victimizations based on race of victims, by type of crime and perceived race of offender.). "Sexual Assault" for this purpose is defined to "include verbal threats of rape and threats of sexual assault." *Id.* This of course does not literally mean that white-on-black rape does not occur but only that it is recorded so infrequently that it is impossible to extrapolate any danger to black women from the data. It should be noted that the definition of rape/sexual assault employed by the Justice Department is being called into question. See generally Erica Goode, *Rape Definition Too Narrow in Federal Statistics, Critics Say*, *NYTIMES.COM* (Sept. 29, 2011), available at <http://www.nytimes.com/2011/09/29/us/federal-rules-on-rape-statistics-criticized.html?pagewanted=all> (last visited Oct. 16, 2011).

Baker, to be sure, may not have been familiar with all these data. What did he know about his wife's reported fears? See *supra* note 51 and accompanying text. In her own book on the subject of rape, Baker's wife acknowledges that she herself was raped. CHARLOTTE PIERCE-BAKER, *SURVIVING THE SILENCE: BLACK WOMEN'S STORIES OF RAPE* 27-51 (1998). She makes it clear, however, that her attackers were black and that it has taken her a long time to get past the fear of young black men. *Id.* at 64, 268-69. She urges black women to put feelings of race loyalty aside and bring charges against sexual predators. *Id.* at 269-70. Houston Baker could not have been unaware of this because in his own recent book he cites hers. See HOUSTON BAKER, *BETRAYAL: HOW BLACK INTELLECTUALS HAVE ABANDONED THE IDEALS OF THE CIVIL RIGHTS ERA* xxi (2008).

60. "What is most disturbing to me personally," Durham Mayor Bell announced, is that although African Americans made up only 43 % of the city's population, they "were allegedly responsible" for over 80 percent of the homicides. See YAEGER, *supra* note 4, at 31 (quoting Mayor Bell). Even if consideration is limited to "hate" crimes, for some, the most heinous of such crimes, whites are not the greatest offenders. The Bureau of Justice reports that proportionally there are significantly more black-on-white than white-on-black hate crimes. If commentary exists disputing these data, I have not seen it.

61. See RICHARD BERNSTEIN, *DICTATORSHIP OF VIRTUE: MULTICULTURALISM AND THE BATTLE FOR AMERICA'S FUTURE* 131 (1994). Baker's jurisprudential vision was likely less

We must not, to be fair, simply dismiss the possibility that Baker and his Group of 88 colleagues were really feeling students' pain, as suggested in the ad. If so, does anything change for our purposes? As long as twenty years ago, Professor Alan Dershowitz warned against the syllogism, "I am offended, [so what you say] must be wrong."<sup>62</sup> "I hurt," that is to say, is not an argument. Quite the contrary, it is a way of finessing an argument. Particularly after the exoneration of the white defendants, it would seem, academic integrity should have impelled the Group to explain in a cogent manner why precisely Duke students were suffering, that is, why the Group needed to roil the campus. Its failure to do so could be expected. "One of the most common violations of intellectual standards by intellectuals," writes the sage Thomas Sowell, "has been the practice of attributing an emotion (racism, sexism . . . ) to those with different views, rather than answering their arguments."<sup>63</sup>

The credibility of the Group of 88 can be tested another way. Suppose that the accused had been black athletes and the accuser a white woman. I will admit that there might have been a similar race to judgment on the part of the prosecutor. But, though I cannot prove the point, it is inconceivable to me, as a long-standing observer of the race and gender scene, that African and African American Studies at Duke would have similarly erupted. Yes, fear of crime would have increased, but fear of stereotyping by whites would have precluded anything like what actually happened.<sup>64</sup> As for how African and African American Studies would have responded, I will cynically suggest that the department would have used a lynching analogy for precisely the opposite purpose, i.e., to bash the white accuser. Any suggestion that white men, on the one hand, and women and minorities, on the other, are not, above all, exemplars of their sex and race in American society undermines the central claim of race and gender critics.

Sharing the overarching view of the white man's villainy—witness its 72% participation in the Group of 88 manifesto—the Women's Studies Department in the counterfactual case would likely have also

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important in securing this position than his esthetic one. How's this?: "the introduction of love, truth and beauty into the world has never been the preoccupation of white leaders and bosses of the West," whose goals have been 'power, money, and lordship over subject peoples.'" *Id.* Crediting poet Amiri Baraka for the insight, Baker goes on to say that it is the "'newly emergent peoples' who are 'attempting to show the hierarchical superiority of their beauty.'" *Id.* (quoting Baker).

62. Alan Dershowitz, *Harvard Witch Hunt Burns the Incorrect at the Stake*, L.A. TIMES, Apr. 22, 1992.

63. THOMAS SOWELL, *INTELLECTUALS AND SOCIETY* 283 (2009).

64. The reader might want to speculate about how the media would have reacted to this hypothetical situation.

been quiescent. Because these were the groups calling for punishment of the lacrosse players at Duke, a more tempered response on their part would almost surely have becalmed the campus and led to more even-handed treatment of the case.

Settling the campus down, however, was still not on the agenda for the Group of 88. In January 2007, confronting calls for an apology and withdrawal of the ad, a group of 87 faculty members, 63 from the original group, signed a letter rejecting the calls. Denying that the ad was “rendering a judgment in the case,” it went on to “stand by the claim that issues of race and sexual violence on campus are real and . . . Duke [should] do something about this.”<sup>65</sup>

We can now get back to Mangum’s allegation of verbal racial abuse, i.e., invective, and its role in the blow-up by the Group of 88. It would seem that after getting paid \$400 each, the two women danced for a few minutes and then refused to continue.<sup>66</sup> What happened then is in some dispute. Given her mental state both at the time of the incident and before,<sup>67</sup> and the lack of evidence of any sexual contact, much less rape, beyond her own report, Mangum is simply not credible. As for racial abuse, her erotic dancing partner, Kim Roberts, who was with Mangum for almost the entire time, did report that someone at the party—though not necessarily the defendants—had used the N-word.<sup>68</sup> But Roberts admitted later in an interview on “60 Minutes” that the comment came after the lacrosse players had demanded their money back and, responding angrily, she had called one of the players a “little dick white boy, who probably couldn’t get it on his own and had to pay for it.”<sup>69</sup> Roberts thought that this racial taunt is what “provoked” use of the N-word.<sup>70</sup> It is not farfetched to see this episode as the foundation for all that followed.

Why Mangum made up the story is unknown. Again, she has never been prosecuted for falsely charging rape. One can only speculate that

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65. See YAEGER, *supra* note 4, at 249-50. A substantial number of the Group of 88 had left Duke after the 2005-06 academic year. *Id.*

66. See TAYLOR, *supra* note 4, at 24-25.

67. Mangum was a troubled young woman. She had been diagnosed with hypertension, anxiety, and bipolar disorder. See *id.* at 19. She had taken antipsychotic drugs. *Id.* at 20. She could not speak or dance coherently at the strip show in question. *Id.* at 24. She had apparently passed out shortly after she stopped dancing. *Id.* at 28. A policeman called in that she had “passed-out” drunk and that she met the test for involuntary commitment. *Id.* at 30-31. She reported at the hospital that she had been “drunk and did not feel pain” at the time of the incident, although she had previously said she had had nothing to drink. *Id.* at 35.

68. *Id.* at 57.

69. See *id.* at 29 (quoting Roberts).

70. *Id.*

she feared trouble with the authorities for not being in control of her faculties.<sup>71</sup>

### *The Rest of the Duke Community*

It would not be fair to tar Duke, a university with 600 full-time, non-visiting arts and sciences faculty at the time,<sup>72</sup> for the acts of the Group of 88. So a question: while the Group of 88 was promoting its cynical vision of the case, what was the reaction of the rest of the faculty, the Duke administration, and the Duke Law School? Shockingly, for months, almost no one in the arts and science faculty spoke out for fair process or just for squelching the trash talk. As for the ad, according to one signatory, “I did not hear from one colleague that there was something wrong with [it].”<sup>73</sup> Why risk a brawl with hot-under-the-collar colleagues when one had no academic duty to do so?

Duke President Richard Brodhead meanwhile made highly disparaging comments about the lacrosse players, calling them “arrogant,” “dishonorable,” “disrespectful,” and “irresponsible.”<sup>74</sup> He labeled the athlete’s behavior “heinous,” reflecting a “culture of privilege.”<sup>75</sup> And he failed to counter claims in the ad and elsewhere that black students were being terrorized on campus. Johnson is critical of Brodhead for this, for failing to protect the lacrosse students from attack by the faculty and other students when the facts were not in.<sup>76</sup> To be sure, Brodhead asked the community to not prejudge the criminal case,<sup>77</sup> but he also told the local Chamber of Commerce, a little ambiguously, that “[i]f our students did what is alleged, it is appalling to the worst degree. If they didn’t do it, whatever they did is bad enough.”<sup>78</sup>

No one commends the students for serving alcohol to minors or for hiring strippers. On the other hand, underage drinking was rampant on campus.<sup>79</sup> As for strip shows, they were hardly as rare as Brodhead’s comment implied. Duke basketball players had organized one just a few

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71. See *id.* at 30-31.

72. See BAYDOUN, *supra* note 4, at 110.

73. See Johnson, *supra* note 7, at 75.

74. See *id.* at 72 (quoting Brodhead).

75. See *id.* at 72-73 (quoting Brodhead).

76. See *id.* at 72-73.

77. See Wasserman, *supra* note 10, at 13.

78. See Johnson, *supra* note 7, at 76 (quoting Brodhead).

79. See DUKE UNIVERSITY LACROSSE AD HOC REVIEW COMM., REPORT OF THE LACROSSE AD HOC REVIEW COMMITTEE 6-7 (2006), available at [http://today.duke.edu/showcase/mmedia/features/lacrosse\\_incident/lacrossereport.html](http://today.duke.edu/showcase/mmedia/features/lacrosse_incident/lacrossereport.html) (last visited July 6, 2011).

weeks earlier and not a few sororities had male strippers performing at their initiation rites.<sup>80</sup> Brodhead was likely playing to his conservative audience.

The important issue here is whether it was possible for the community not to explode when even the President was coming down on the students. Of course, there were risks if Brodhead had held his tongue. “We had to worry that things might blow,” an unidentified Duke official is quoted as explaining; “What if there were riots in Durham?”<sup>81</sup>

There was, however, a middle ground. Consider a simple but potent statement Brodhead could have made, which, perhaps, most readers here would have signed on to:

Friends: As most of you are aware by now, charges of sexual abuse have been brought against some of our student athletes. These charges, which we take seriously, are being assessed by the district attorney’s office as well as by this administration. To allay any immediate concerns for safety, I have asked the campus police to step up patrols. While the inquiries are ongoing, no one should prejudice *any aspect of the case*; the students are entitled to fair process both on campus and in the courts. Be advised that I have also asked the campus police to guard against harassment of student athletes. Any charge along those lines will be investigated under the same code of conduct that is being used to evaluate the athletes. I will keep you apprised of developments.

Essayist and law professor Robert O’Neil quotes Brodhead as saying that he kept silent so as not to cramp faculty discourse<sup>82</sup> and then O’Neil extends the argument.<sup>83</sup> Must readers buy any of this? Surely, the president of the university is hired to lead, not to serve as facilitator for faculty discussion. Presidents are not just the highest ranking bureaucrats; they are the chief executive officers as well as the moral

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80. See TAYLOR, *supra* note 4, at 17.

81. See *id.* at 131.

82. Brodhead’s words are worth quoting: “Faculty members do not, and should not, speak for my approval. I was careful not to make any statements that could make it seem that I was on one person’s side rather than another, or to say, ‘Watch out when you engage in free speech, because the president is watching.’” “The president of the university’s role,” Brodhead has added, “is to protect the space of discourse, not to advance his particular views . . . whenever the president speaks, it’s read as an exercise of authority.” See O’Neil, *supra* note 51, at 98-99.

83. “[T]he potentially explosive racial and gendered tension created by the rape charges mandated caution, lest a defensive statement from the university appear insensitive to the volatility of a highly charged situation. Not only was a winning situation not apparent, even a possible survival mode remained elusive for many months.” See *id.* at 109.

spokespersons of the university. They are paid well to balance competing interests against one another and to make hard decisions: to build a law school, a medical school, or neither; to grant or deny tenure to a controversial professor; to adopt an affirmative action program or to adopt color-class-and gender-blind admissions; all matters that can affect the well-being of the university for generations. No one has the global and historic view of and responsibility for the university that presidents have.

Presidents are also faculty members with all the rights and obligations of such. Indeed, academics who might have felt silenced by hearing the president—or women and minorities—speak their minds were likely not taking advantage of their own tenure,<sup>84</sup> which was designed for the very purpose of protecting their speech against recrimination by others, including not least, senior university administrators. If tenure is not doing its job, perhaps it should be scratched so that it does not protect those who are not doing theirs.

While rejecting Brodhead's facilitator-in-chief claim, we have thus far not identified a more likely motive for his actions. Why did Brodhead not follow the lead of Peter Lange, the provost, who denounced the behavior of some of the faculty?<sup>85</sup> We cannot, of course, be sure of Brodhead's mindset, but especially because he himself has "put into evidence" his own motives, it is not unfair to consider an alternate explanation. Here I suggest is the crux of the Duke Rape matter.

Brodhead feared rebuke by the women and minorities on campus. Through the *sturm und drang* of the ad, the African American and women's studies departments had turned the incident into a major civil rights issue; anyone who opposed them would be construed as willfully ignorant of the condition of women and minorities. "[W]hat is apparent everyday [sic] now is the anger and fear of many students who know themselves to be objects of racism and sexism, who see illuminated in this moment's extraordinary spotlight what they live with everyday."<sup>86</sup>

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84. Asked why she had put her name to the Group of 88 ad, faculty member Susan Thorne explained that otherwise "my voice won't count for much in my world." See TAYLOR, *supra* note 4, at 328 (quoting Thorne).

85. "We will not rush to judgment nor will we take precipitous action . . . playing to the crowd." See O'Neil, *supra* note 51, at 99 (quoting Lange). "Disappointed, saddened, and appalled," he upbraided Houston Baker for the "prejudice—one felt so often by minorities, whether they be African American, Jewish or other" reflected in Baker's presumption "that something 'must' have been done by or done to someone because of his or her race, religion or other characteristic." See Johnson, *supra* note 7, at 70.

86. See YAEGER, *supra* note 4, at 121.



Not, however, to those students who made up the women's lacrosse team, which presumably had the advantage of knowing the men's lacrosse players far better than Brodhead or the Group of 88. These women were the "most public and vocal supporters" of the defendants.<sup>87</sup>

Undoubtedly, Brodhead did not wish to be taken for an insensate member of the academic establishment, protected from the turmoil of daily life by the high walls of his presidential mansion. The fact that the Group of 88 consisted of only 88 people was no indication of its power; it had leverage. That even after the subsequent embarrassment over the case and a public apology by Brodhead, two members of the Group of 88 were appointed as deans,<sup>88</sup> presumably with Brodhead's consent, and that Brodhead elevated the status of African and African American Studies<sup>89</sup> only supports the view that Brodhead did not want to be the white man's Duke president.

As for the venerable law school, it largely gets a pass from these essays. On the one hand, to be sure, a committee appointed by Brodhead and led by Duke law professor James Coleman, himself an African American, concluded that the lacrosse players were respectful to faculty and staff and showed no sexism or racism in their behavior.<sup>90</sup> In June 2006, moreover, Coleman wrote a letter to a local newspaper pointing out various misdeeds by Nifong and calling for his removal from the case.<sup>91</sup> Yet, in the early stages, not one law professor spoke up to decry the harassment of the athletes or the actions of the Group of 88, or to simply recommend that, in the interests of basic fairness, the case be wholly entrusted to the district attorney. Indeed, in September 2006, Karla Holloway insisted that "[j]udgments about issues of race and gender that the lacrosse team's sleazy conduct exposed cannot be left to the courtroom."<sup>92</sup> Timely and public statements by the law faculty, it seems, could have stopped, or at least slowed, the runaway train.<sup>93</sup>

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87. See Wasserman, *supra* note 12, at 18.

88. See Johnson, *supra* note 7, at 87.

89. See TAYLOR, *supra* note 4, at 299.

90. See DUKE, *supra* note 79, at 3-4. See also Johnson, *supra* note 7, at 77.

91. See TAYLOR, *supra* note 4, at 239-40.

92. See BAYDOUN, *supra* note 4, at 107 (quoting Holloway).

93. James Coleman excuses the Group of 88 for not "being familiar with the terms of the petition" i.e., the petition was one-page long. Was that too much to read? Coleman goes on to insist that, given academic freedom, the university has no way to prevent the faculty members from "saying something about some controversy that is before the public." James Coleman, *The Phases and Faces of the Duke Lacrosse Controversy: A Conversation*, 19 SETON HALL J. SPORTS & ENT. L. 181, 210 (2009). Prior restraint on faculty speech is not, of course, the issue, but rather whether the university should have said something after the Group of 88 spoke.

## THE MEDIA

For a useful take on the media's performance in the case, imagine how the storyline would have developed if the alleged victim had been white and the victimizer black. Taylor and Johnson do an exemplary job here, showing how in a number of such cases the media actually played down the racial aspects.<sup>94</sup>

So what accounted for the media's race—and class—fixation in this case? It was the man-bites-dog aspect of the case, the reversal of the way our world normally works, Professor Wasserman suggests, that made it newsworthy and then a media sensation; "all settled expectations were upended."<sup>95</sup> It is not entirely clear what Wasserman had in mind in the way of reversal. Presumably, it was the white-on-black rape and the fact that white students especially in the South were being prosecuted for a crime against a relatively poor black woman. In any event, not *all* settled expectations were upended. Above all, not those of most reporters. Recall former New York Times Public Editor Daniel Okrent's assessment that the story "conformed too well to too many preconceived notions of too many in the press: white over black, rich over poor, athletes over non-athletes, men over women, educated over non-educated."<sup>96</sup> Here it is again: the underlying frame is the story of the haves over the have-nots. The upending of *this* storyline mostly took place relatively late in the game, only long after it became untenable.

Okrent does not put a political label on these preconceptions, but he is clearly referring to what he perceives as the liberal philosophy of the media. While the media performed better than the criminal justice system—indeed, some elements, according to essayist Rachel Smolkin, got the story right almost from the beginning<sup>97</sup>—much of the mainstream press could not resist sticking with its support of Mangum and the prosecutor. Like the academics at Duke, some could not resist displaying their knowledge of the sad realities of history. Mangum's accusations against "generally privileged, younger white men," a Time Magazine piece reported, "conjures up memories of that classic American sex story: the pretty female slave being summoned up to the big house to sexually satisfy the master."<sup>98</sup> "[I]t's impossible," wrote Washington Post columnist Eugene Robinson, "not to think of all the

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94. See TAYLOR, *supra* note 4, at 126-27.

95. See Wasserman, *supra* note 12, at 15.

96. See Smolkin, *supra* note 3, ¶ 6.

97. Smolkin commends Dan Abrams, now general manager of MSNBC, for this. See Rachel Smolkin, *Justice Delayed*, INSTITUTIONAL FAILURES 131, 143 (Howard M. Wasserman ed., 2011).

98. See *id.* at 139 (quoting Jeninne Lee-St. John of Time Magazine).

black women who were violated by drunken white men in the American South over the centuries.”<sup>99</sup> Does that mean that it is not worth trying? Of apparently no account to the commentators is that Mangum, unlike the pretty slave, had a choice as to whether to accept the invitation.

This foregoing discussion challenges the man-bites-dog standard as a useful measure of newsworthiness. If nothing else, we learn from the Duke Rape story that these are not stable conceptions. Even accepting the assumption that the accused were “the man” in the metaphor because they were the privileged white athletes at a powerful private university, once the academics, the prosecutor, and members of the press were on the same page, serious man-bites-dog enthusiasts would have to acknowledge that the roles had reversed, i.e., the boys were no longer privileged, and that the posture of the media had to change with it. Readers learn more fundamentally from “Institutional Failures” that every group can damage the body politic and accordingly, that *all* antisocial behavior needs to be highlighted.

What are the obligations of journalists in high profile cases? Among many other things, essayist and professor of media studies Jane Kirtley teaches, journalists have a code of ethics that requires them to “[s]eek the truth and report it”; “test the accuracy of information from all sources,” and “[a]void stereotyping by race, gender, age [etc.]”<sup>100</sup> What happened in this case instead, as Kirtley concludes, is that most of the media simply ran with the prosecutor’s story and the class and cultural stereotypes.<sup>101</sup>

What may have stymied the pursuit of truth, Kirtley speculates, was the media practice of not revealing the names of sexual assault complainants, an identification that is routine for other crimes.<sup>102</sup> Had Mangum’s name come out, attention might have been quickly drawn not only to her emotional instability,<sup>103</sup> but also to her disreputable past. She had a criminal record involving drunken driving, a stolen car, and an attempt to flee from police.<sup>104</sup> While they would have been revealed at the outset in any serious evaluation of her charges, Mangum’s character

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99. See TAYLOR, *supra* note 4, at 197 (quoting Robinson).

100. See Jane Kirtley, *Not Just Sloppy Journalism, but a Profound Ethical Failure: Media Coverage of the Duke Lacrosse Case*, INSTITUTIONAL FAILURES 147, 149 (Howard M. Wasserman ed., 2011).

101. See *id.* at 147.

102. See *id.* at 158.

103. See *supra* note 67 and accompanying text.

104. See Smolkin, *supra* note 3, at 135.

flaws may in fact run deeper, given her recent indictment for the murder of her boyfriend.<sup>105</sup>

The policy of nondisclosure seems patronizing towards women and may, as Kirtley suggests, no longer be appropriate.<sup>106</sup> Perhaps this is because it bespeaks a kind of puritanism. Having been raped is no longer, it would seem, likely to affect a woman's marriageability. If rape is experienced not as sex but as violence, as is often argued, then it should be no more embarrassing than assault and thus should be treated as such. An exception could be made for those under the age of majority who might not be mature enough to deal with the attention that publicly revealed sex and criminal victimization bring. Mangum, however, was no naïf in this respect, but a young mother of two.<sup>107</sup>

The best of the reporters did change their positions as the story developed, and Smolkin properly credits them.<sup>108</sup> Too many reporters and editors, however, seemed to close their minds. Taylor chastises the Raleigh News & Observer for, among other things, failing to qualify the victimizers as "alleged."<sup>109</sup> Smolkin harshly reproaches the New York Times for its performance,<sup>110</sup> though she and Kirtley commend Daniel Okrent, its former Public Editor, for his call for a public apology by the media.<sup>111</sup>

#### THE CRIMINAL JUSTICE SYSTEM

The job of the prosecutor, as law students quickly learn, is "not to win a case, but [to see] that justice shall be done."<sup>112</sup> Essayist Professor Angela J. Davis highlights district attorney Nifong's misconduct. Nifong made prejudicial statements to the media, induced the crime lab to omit exculpatory evidence, failed to produce that evidence when it

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105. Jesse James Deconto, *Mangum Faces Murder Charge: Boyfriend Died Last Wednesday*, THE DURHAMNEWS.COM (Apr. 20, 2011), <http://www.thedurhamnews.com/2011/04/20/206429/mangum-faces-murder-charge.html> (last visited Oct. 16, 2011). Mangum's co-worker, Roberts, also had run-ins with the law. She had been convicted of embezzling \$25,000 from an employer.

106. See Kirtley, *supra* note 100, at 158-59.

107. See Smolkin, *supra* note 3, at 132.

108. The Raleigh News & Observer's Ruth Sheehan apologized in late April 2006 for her hasty judgments on the case. See *id.*

109. See TAYLOR, *supra* note 4, at 65-66.

110. See Smolkin, *supra* note 3, at 140-41; Kirtley, *supra* note 100, at 153-54. According to Taylor, when the Times reporter assigned to the case starting having doubts about the guilt of the defendants, the Times reassigned the case to another, who proceeded to describe the defendants as "a group of privileged players of fine pedigree entangled in a night that threatens to belie their social standing as human beings." See TAYLOR, *supra* note 4, at 120-21.

111. See Smolkin, *supra* note 3, at 145; Kirtley, *supra* note 100, at 15.

112. *Berger v. United States*, 295 U.S. 78, 88 (1935).

was demanded by the defense and by the court, and made misrepresentations to the court.<sup>113</sup> Davis then uses the case as a springboard for discussion of prosecutorial misconduct generally. She cites a major 2003 report on the subject showing that of 11,450 such cases reviewed by appellate courts, misconduct was found in 2000 of them, resulting in dismissals and reductions of sentences.<sup>114</sup> This is a substantial number and yet in only 44 cases since 1970, she reports, have disciplinary charges been brought against prosecutors, and only in two of these was a prosecutor disbarred.<sup>115</sup> Given the power of the prosecutor, her sensible solution is to encourage more judges to look for prosecutorial misconduct and to have state bars strengthen rules against it.<sup>116</sup>

When racializing her analysis, Davis is less persuasive. Among the charges against the criminal justice system that Davis considers, and then dismisses, is that the defendants in the Duke case were treated more harshly than African Americans would have been because of their race.<sup>117</sup> She is right of course that, with fewer resources on average than whites to hire top legal talent, African Americans are more vulnerable to prosecutorial misconduct and that an absence of effective representation induces many minority defendants to plead guilty in inappropriate circumstances. Davis is also right that the Duke defendants did not have to spend a day in jail and were publicly exonerated in the end.

To the issue of whether the Duke defendants were *targeted* in the first place because of their race, however, the answer may well be yes. In an unusual turn of events for the District Attorney, Michael Nifong quickly took personal control of the case. In so doing, he made his racialized position clear: “I am convinced there was a rape,” he announced early on. “I’m not going to allow Durham’s view in the minds of the world to be a bunch of lacrosse players from Duke raping a black girl in Durham.”<sup>118</sup> “The contempt shown for the victim based on

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113. See Angela J. Davis, *When Good Prosecutors Go Bad: From Prosecutorial Discretion to Prosecutorial Misconduct*, in INSTITUTIONAL FAILURES 23, 26-27 (Howard M. Wasserman ed., 2011).

114. NEIL GORDON, THE CTR. FOR PUB. INTEGRITY, MISCONDUCT AND PUNISHMENT: STATE DISCIPLINARY AUTHORITIES INVESTIGATE PROSECUTORS ACCUSED OF MISCONDUCT (2003), available at <http://projects.publicintegrity.org/pm/default.aspx?act=sidbarsb&aid=39> (last visited Oct. 16, 2011).

115. See Davis, *supra* note 113, at 31.

116. See *id.* at 42.

117. See *id.* at 36.

118. See Smolkin, *supra* note 3, at 132 (quoting Nifong).

her race,” he added, “was totally abhorrent.”<sup>119</sup> This public prejudgment may help explain why Nifong did not dismiss the rape charge for lack of sufficient evidence or ask Mangum to take a polygraph test.<sup>120</sup> Indeed, as Nifong himself later admitted, he never spoke at all to Mangum about the incident.<sup>121</sup> Expounding on the class aspects of the case, Nifong reported “a feeling in the past that Duke students are treated differently in the court system. . . . that Duke students’ daddies could buy them expensive lawyers and that they knew the right people.”<sup>122</sup> Publicly framing the issue in black and white and in class terms meant that Nifong had to stick, and indeed did stick, to the frame long after it had lost its usefulness. He might not have done so if the complainants had been white.

As for the exoneration, Davis is right that poor blacks do not get *this* level of justice. The high-powered and presumably well-funded defense<sup>123</sup> certainly contributed to that outcome; the average defendant’s legal counsel team has to be satisfied with getting his or her client off. That is unfortunate and Lady Justice would be most pleased if funding were available to police and prosecutors so they could perform complete investigations and declare actual innocence where appropriate. At the same time, however, the defendants in this case—surely because of their race—were smeared on the front pages not only in Durham but all over the country and indeed the world. Bearing the mark of Cain, they needed public exoneration more than most. Of course, insofar as Nifong’s conviction for his misdeeds is concerned, black defendants do not get that level of justice.

In addition to encouraging judges to look for prosecutorial misconduct and state bars to strengthen rules against it, Davis proposes increasing the standard for indictment from probable cause of guilt to reasonable assurance that the defendant will be actually be found guilty (i.e., guilt beyond a reasonable doubt).<sup>124</sup> Indictments, in her view, would be harder to obtain in this way and prosecutors would not be able

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119. See TAYLOR, *supra* note 4, at 87. Did Nifong know that he was in way too deep in this case? Perhaps. As early as March 27, 2006 he is reputed to have admitted privately, “You know we’re fucked.” See TAYLOR, *supra* note 4, at 89.

120. See *id.* at 378.

121. See Kirtley, *supra* note 100, at 155.

122. See *id.* at 151. As a graduate of University of North Carolina Law School, a public university, Nifong may have harbored some resentment toward the private and higher-ranked Duke University, its rival in many respects.

123. The cost of the defense was at least \$5,000,000. See TAYLOR, *supra* note 4.

124. See Davis, *supra* note 113, at 32.

to lean as easily on poor, minority defendants, thereby inducing them to accept pleas.<sup>125</sup>

The proposal has some merit. The problem is that it is difficult for the prosecutors to assess guilt beyond a reasonable doubt until all the evidence is in and cross-examination has taken place. Adopting Davis' approach would mean that the indictment stage would be postponed, perhaps for a long time. But that would work against the interests of many defendants who are unburdened by the weight of criminal charges early on when a grand jury refuses to indict. Further discussion of the issue would have been helpful.

Curiously, although Davis suggests that she will explain why Nifong went bad, she does not do so. The reason for Nifong's misconduct, however, seems to be clear and is supported by the fact that in one week Nifong gave 70 media interviews.<sup>126</sup> Nifong was in the middle of an election campaign and, while trailing badly, privately admitted that the case was giving him a million dollars of free advertising.<sup>127</sup> With high town/gown tension in Durham, and with African Americans making up 43% of the electorate,<sup>128</sup> Nifong needed their support.<sup>129</sup> He got it.<sup>130</sup> A full discussion of the election campaign issue by Davis would have raised important questions about whether district attorneys should be elected or appointed.

Nifong himself has not apparently spoken out on the Duke affair. The great majority of prosecutors, however, do not implode on the job. Davis herself reports that in thirty years on the job he had never been charged with a disciplinary violation and indeed "enjoyed a reputation as a fair prosecutor."<sup>131</sup> She speculates that Nifong may have believed that black victims do not get justice in America and wanted to do his part to

125. *See id.*

126. *See TAYLOR, supra* note 4, at 84, 85.

127. *See id.* at 99.

128. *See YAEGER, supra* note 4, at 31.

129. *Id.* at 3 (reporting on a Princeton Review assessment of town-gown conditions). Duke was sometimes referred to as the "Plantation." *Id.* at 27. One of Nifong's electoral competitors was himself African American. *See TAYLOR, supra* note 4, at 172. The Bar panel that disbarred Nifong characterized his motive as "self-delusion motivated by self-interest." *See Johnson's* comments in Coleman, *supra* note 93, at 189.

130. The Committee on the Affairs of Black People at least supported him. *See BAYDOUN, supra* note 4, at 36. Nifong won 95 % of the African American vote. *See TAYLOR, supra* note 4, at 296. Coleman himself concluded that Nifong had pandered to the black community through his handling of the case. Coleman, *supra* note 93, at 186.

131. *See Davis, supra* note 113, at 23.

remedy this situation.<sup>132</sup> Maybe so. Is this argument by a critical race theorist paradoxically an argument *for* prosecutorial colorblindness?

Essayist and law professor Sam Kamin examines 42 U.S.C. § 1983 to see whether continuing lawsuits against Durham and its officials for deprivation of constitutional rights are likely to succeed. If so, that might help deter similar prosecutorial misconduct. He points to two major obstacles to the use of section 1983 to recover for prosecutorial misconduct. First, such an action “almost certainly” requires that the plaintiffs had a trial.<sup>133</sup> Not one of the lacrosse players was brought to trial or is likely to be brought to trial in the future. Second, enjoying sovereign immunity, a state is not a “person” for section 1983 purposes, so a determination has to be made as to whether the district attorney is a state or local official. The relevant circuit court, he reports, has held that prosecutors are state, not local officials and thus cannot be sued.<sup>134</sup> For Kamin, in sum, an alternative to section 1983 needs to be found to deter prosecutorial misconduct.<sup>135</sup> He offers no plan to accomplish that purpose, however, and none is offered here.

#### SPORT ACADEMIC COMPLEX

One of the issues that the subject volume fails to address is whether big-time sports can co-exist with a serious academic program. The story of sports programs run amok on American campuses is an old one. Under this heading, the United States has experienced scandals involving paying athletes under the table, changing grades and transcripts, cheating on exams, recruiting students with little if any academic ability, and creating easy academic programs for athletes.<sup>136</sup> Numerous efforts at reform over the last century have followed. Most of them, it would seem, have been tied to recruiting practices,<sup>137</sup> to the prevention of injuries,<sup>138</sup> and to the failure of universities to help student athletes emerge with degrees. Thankfully, appreciable progress has been made in the latter areas. Indeed, in this last connection, Duke has

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132. *See id.* at 35.

133. *See Kamin, supra* note 10, at 55.

134. *See id.* at 62-63 (citing *Nivens v. Gilchrest*, 444 F.3d 237, 249 (4th Cir. 1996)).

135. *See id.* at 64.

136. *See BOK, supra* note 17, at 39, 41, 44; O’Neil, *supra* note 51, at 92.

137. Recruiting violations keep making the front pages. *See* Pete Thamel, *College Football’s Ugly Season, Facing Scandals of Every Stripe*, NYTIMES.COM (Aug. 21, 2011), at ¶ 4, available at [http://www.nytimes.com/2011/08/21/sports/ncaafootball/college-football-more-embattled-than-ever.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2011/08/21/sports/ncaafootball/college-football-more-embattled-than-ever.html?_r=1&pagewanted=all) (last visited Oct. 16, 2011).

138. *See LaMay, supra* note 17, at 176.



become a model in big-time college athletic circles, boasting of a graduation rate for athletes of 92% to 100% within six years.<sup>139</sup> The lacrosse team's graduation rate was 100%.<sup>140</sup> This success perhaps explains why the essayists dealing with sports in the book do not investigate the larger issue.

Insofar as curbing athlete misconduct is concerned, however, and particularly sexual assault, universities have a long way to go. Essayist Professor Craig LaMay reports on a small-scale study showing that in the big-sports (Division I) schools, male athletes composed 3.7% of the student population, but 19% of those charged with sexual assault, football and basketball players were especially likely to be charged, representing only 30% of athletes but 67% of athletes accused of sexual assault. Curiously, LaMay tries to limit the significance of the stark data he reports. The data he employs for this purpose, however, are only marginally relevant to this issue.<sup>141</sup>

A not insignificant literature, sad to say, supports teaching our daughters to exercise greater caution while in the company of male athletes.<sup>142</sup> Joseph Lapchick, Head of the Center for Sports and Ethics at the University of Central Florida, is thus more credible when he writes of so-called hostess groups ("angels") being provided to welcome athletes during recruiting season on campus:

Colleges have allowed a kind of culture to exist where they're using sex as a vehicle. Formally or informally, they're creating a culture that sets in motion a feeling of license on the part of players at that school that they can have sex with women against their will.<sup>143</sup>

No data on sexual assault at Duke by sport is included in this volume. We cannot therefore assess whether the white lacrosse players behaved worse in that realm than members of other teams, which, unlike lacrosse, had substantial minority participation.<sup>144</sup> That kind of

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139. See Dr. Ellen J. Staurowsky, *In the Shadow of Duke: College Sport and the Academy Divided*, INSTITUTIONAL FAILURES 111, 112 (Howard M. Wasserman ed., 2011).

140. See DUKE, *supra* note 79, at 3.

141. LaMay reports a 2003 study showing that students do not *believe* that athletes commit more sexual assaults than non-athletes. See LaMay, *supra* note 17, at 182.

142. See, e.g., Staurowsky, *supra* note 139, at 118-19. See also TODD W. CROSSET, JAMES PTACEK, MARK A. McDONALD & JEFFREY R. BENEDICT, MALE STUDENT-ATHLETES AND VIOLENCE AGAINST WOMEN, A SURVEY OF CAMPUS JUDICIAL AFFAIRS OFFICERS, <http://Sagepub.com/content/2/2/163> (last visited Mar. 17, 2012).

143. *Id.* at 118 (quoting Lapchick).

144. There was only one black player on the lacrosse team. See Chris Fransescani, *Sole Black Duke Lacrosse Player Says White Teammates Stereotyped*, ABCNEWS.GO.COM (Oct. 31, 2006), available at <http://abcnews.go.com/GMA/LegalCenter/story?id=2617301&page=1>.

information could have provided valuable insight into the race-based elements of the case against the defendants. Again, we do know that heavy drinking was rampant among student groups on campus, including those underage.<sup>145</sup>

We also know that there is no record of sexual assault charges previously filed against any lacrosse team members. Again, the Coleman report<sup>146</sup> characterizes the Duke Lacrosse team as basically “respectful” towards faculty and staff.<sup>147</sup> At the same time, over the previous three years, one-third of the team had been charged with offenses tied to drunken and disruptive behavior.<sup>148</sup> The Coleman report itself highlights that the team presents a “history of irresponsible conduct that this university cannot allow to continue.”<sup>149</sup>

A student-athlete handbook, to be sure, has theoretically regulated an athlete’s behavior at Duke. It threatens sanctions for both underage drinking and drinking “any time the team is together in an official capacity”<sup>150</sup>; presumably, the party in question was not one of these. The handbook also warned that a felony charge against an athlete could result in suspension from his or her team. That these kinds of strictures do not go far enough to tamp down student athlete misbehavior may be evident given the off-campus lacrosse party that is the subject of this article, if not the other circumstances discussed herein. Perhaps a kind of morals clause similar to ones in effect for professional athletes and actors should be considered.

How can ferocious pressures for athletic success on university administrators and athletic departments be handled?<sup>151</sup> Essayist Professor Ellen Staurowsky calls for greater faculty supervision of athletics.<sup>152</sup> The idea is that the faculty’s academic orientation would be able to shield administrators from the win-at-all-costs pressures of alumni and other contributors.<sup>153</sup>

We learn from Staurowsky herself, however, that schools with faculty oversight may be no better at controlling athletes than those that

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145. See DUKE, *supra* note 79, at 6-7; TAYLOR, *supra* note 4, at 209.

146. See DUKE, *supra* note 79, at 6.

147. See *id.*; BAYDOUN, *supra* note 4, at 78.

148. See Smolkin, *supra* note 3, at 5.

149. See BAYDOUN, *supra* note 4, at 79 (quoting from the Coleman Report).

150. “In the event that an athlete is charged with a felony,” the official Handbook says, the student will not normally be allowed to represent the school. See Staurowsky, *supra* note 139, at 117.

151. See *id.* at 112; BOK, *supra* note 17, at 37, 51, 123.

152. Staurowsky, *supra* note 139, at 124.

153. *Id.*

lack it. Faculty get co-opted with tickets and other perks.<sup>154</sup> No less important, faculty are trained in their subject matter but generally receive no training in evaluating student misconduct. Only deans receive such training.

These facts suggest that in the last analysis it is not the individual school but the NCAA and other intercollegiate athletic governing bodies that will have to solve the problem, although the NCAA has received some bad marks for many of its efforts at college sports regulation.<sup>155</sup> Nevertheless, the problem of athlete violence seems so great that the effort seems worthwhile.

This is not to imply that university presidents can walk away from their responsibility to regulate conduct on their campuses. It is the administration that is going to be sued and embarrassed. There would seem then to be no alternative to the need for presidents to stiffen their spines.

### CONCLUSION

The job for university presidents would seem much bigger than even “Institutional Failures” suggests. If the Group of 88 opinion was reckless on the issue of gender and race in the case under review, what are the implications more generally for the scholarship that has come out of women’s and ethnic studies departments? Founded on a theory of white male rapaciousness and reflecting a hair trigger sensibility, can the Group of 88 member opinion be at all credible on such contentious issues as abortion, racial profiling, pornography, affirmative action, and workplace discrimination, much less rape?<sup>156</sup> Is this not a matter that

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154. See *id.* at 124.

155. See BOK, *supra* note 17, at 125-32.

156. For recent claims of anti-woman bias in the hard sciences, see Bo Han, Note, *Mentoring Policies to Increase Women’s Participation in Commercial Science*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 409 (2009), and Lucy M. Stark, *Exposing Hostile Environments For Female Graduate Students in Academic Science Laboratories: The McDonnell Douglas Burden-Shifting Framework as a Paradigm for Analyzing the “Women in Science” Problem*, 31 HARV. J. L. & GENDER 101 (2008). What are we to make of the datum that women in the top 100 schools today make up only 9 to 16% of tenure-track professors? A new, empirically robust study would seem to be required reading. Written by two Cornell psychologists, a man and a woman, the authors reject claims of discrimination and the policies they have engendered: “[T]he ongoing focus on sex discrimination in reviewing, interviewing, and hiring represents [a] costly, misplaced effort: . . . [the] current initiatives direct energy towards solving past problems rather than current ones.” STEPHEN J. CECI ET AL., UNDERSTANDING THE CAUSES OF WOMEN’S UNDERREPRESENTATION IN SCIENCE 1, PNAS EARLY EDITION (Dec. 6, 2010), available at <http://www.pnas.org/cgi/doi/10.1073/pnas.1014871108> (last visited Jan. 29, 2012). Indeed, Ceci and Williams hold, “women in math-intensive fields are interviewed and hired slightly in excess of their representation among PhDs applying for tenure-

university presidents, department chairs, and tenure committees need to confront frontally?

I have dealt with the destructive nature of Manichean “identity” scholarship in law schools and will not repeat myself here.<sup>157</sup> Suffice it to say that I am not the only one to distrust identity as a scholarly credential. Recall Houston Baker’s demand that assessment of the Duke Rape matter be left to African American and women’s studies departments.<sup>158</sup> But “[t]he view that being a member of a minority group endows one with special insights into its problems,” writes Orlando Patterson, a distinguished professor of sociology at Harvard who is African American himself, “has had devastating consequences for the academic study of African American life and intergroup relations.”<sup>159</sup> In particular, Patterson explains, “Racism, an undeniable fact for most African Americans, has been for too many the explanation of every problem, the excuse for every failing, the moral whip with which to lash out at anyone who dares to criticize.”<sup>160</sup>

To be sure, if whites speak their minds about race, that may be hurtful. That this may be no more hurtful than when minority scholars call white men racist rapists is not the point. Here is Patterson again: “Afro-American and Euro-American persons should treat each other exactly alike: as responsible moral agents. We do not need any special sets of sensitivities.”<sup>161</sup> The solution to racial tensions can come only with forthright talk.<sup>162</sup> In this respect—*only?*—the Group of 88 should be commended.

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track positions.” *Id.* at 5. The most important contributors to women’s under-underrepresentation in these fields, the authors conclude, are women’s fertility decisions and lifestyle choices. *Id.* Attention should be given to those factors explicitly, rather than to blunderbuss charges of gender bias.

157. See Dan Subotnik, *Are Law Schools Racist?: A “Talk” with Richard Delgado*, 43 U.S.F. L. REV. 227, 233, 250 (2008).

158. See *supra* note 43 and accompanying text.

159. ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS* 3 (1997). The legendary black scholar John Hope Franklin long ago condemned limiting race to “Negroes [because they] had peculiar talents that fitted them to study themselves and their problems,” calling it a “tragedy.” He likened it to the view that there was a ‘mystique’ about Negro spirituals which required that a person have a black skin in order to sing them. This was not scholarship; it was folklore, it was voodoo.” John Hope Franklin, *The Dilemma of the American Negro Scholar*, in *BEST AFRICAN AMERICAN ESSAYS 2010*, at 349 (Gerald Early et al. eds., 2010) (reproducing an essay the first appeared in 1963).

160. PATTERSON, *supra* note 159, at 2.

161. *Id.* at 115.

162. “If engagement is the first step in healing, then the second is pure unadulterated struggle. We will never achieve racial healing if we do not confront one another, take risks. . . say all the things we are not supposed to say in mixed company.” *Supra* note 1 and accompanying text.

“Institutional Failures” did not help the criminal justice system avoid a rush to judgment in the Dominique Strauss-Kahn case. Will it at least help college presidents, and academics generally, to deal with an incident such as Duke Rape so that if it arises again, and it surely will, we could reasonably expect that the matter would unfold in a calmer, more business-like, manner? In some ways, yes. If the book has an overriding lesson to teach its readers, it is that in a world where our most honored academics and venerable institutions can easily go off the tracks on race—and gender—opposing racialism does not equal racism.<sup>163</sup>

Whether that will be enough is another matter. While Duke was quick to investigate its lacrosse team for behavior detrimental to the university,<sup>164</sup> it has shown no interest whatever in evaluating the work of its “identity” departments, which have surely caused it more damage by unnecessarily pitting segments of the community against each other. Nor, as far as I can tell, has any other university undertaken the introspection. This perhaps could have been expected. “In an era of political correctness and craven university administrations,” wrote former New York Times reporter Richard Bernstein almost 20 years ago, virtually predicting the Duke Rape scenario, “the charge of racism, unsubstantiated but accompanied by demonstrations and angry rhetorical perorations, suffice to paralyze a campus, to destroy a reputation, and to compel an administration into submission.”<sup>165</sup>

“Institutional Failures,” indeed, offers no promise of a different outcome for a Duke Rape redux. If the academy, the media, the criminal justice system, and the sports academic complex have adopted any prophylactic measures, the book does not report them. With experience and intense self-scrutiny, Don Quixote himself came to see that his actions were not heroic, but mock heroic, that the true hero is, rather, the person who needs no extravagant chivalric visions.<sup>166</sup> The defiant rejection of a call for an apology by the Group of 88, contrariwise, offers no reassurance that those in Women’s and African and African American Studies have seen the light.<sup>167</sup>

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163. Racialism is the view of the world in racial terms. Racialism is different from racism in that it does not necessarily connote a sense of the superiority of one race over another.

164. See *supra* note 90 and accompanying text.

165. See TAYLOR, *supra* note 4, at 134 (quoting Bernstein).

166. MIGUEL DE CERVANTES, DON QUIXOTE II, at 495-504. See also ERNEST BECKER, THE DENIAL OF DEATH (1997) (Pulitzer Prize winner 1974).

167. In a public statement, respondents to the plea for a public apology categorically opposed all “calls to the authors to retract the ad or apologize for it.” See Johnson, *supra* note 7, at 86 (quoting the signatories). Not much help can be expected from critical race theorists in this regard. Professor of law Sumi Cho calls on scholars to reject the “politics of respectability” that dictates “an

Nor is the federal government helping to avoid a reprise of a Duke Rape-type brouhaha. Quite the opposite. Premised on the notion that sexual assault is rampant on campus, indeed, that one in five women are sexually assaulted or the subject of an attempted assault on campus, in April 2011, the U.S. Department of Education, Office of Civil Rights announced guidelines for the many hundreds of colleges and universities it regulates.<sup>168</sup> Under these rules, which distinguish sexual assault from other types of criminal behavior, schools now have to judge students accused of sexual harassment or sexual assault based on a “preponderance of the evidence” instead of “clear and convincing evidence,” which is apparently the standard that a number of schools currently apply.<sup>169</sup>

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illusory divide between scholar and community.” If in the wake of a charge of rape by a black woman against white men a minority community wants lacrosse players’ scalps, that is, scholars must do what they can to deliver them. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1649 (2009).

168. See RUSSLYNN ALI, DEAR COLLEAGUE LETTER, OFFICE OF THE ASSISTANT SECRETARY, DEPARTMENT OF EDUCATION 2, 11 (Apr. 4, 2011), available at <http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html>.

169. *Id.* For a comment on the report, see Lauren Sieben, *Education Department Issues New Guidelines for Sexual Assault Investigations*, THE CHRONICLE OF HIGHER EDUCATION (Apr. 4, 2011), available at <http://chronicle.com/article/Education-Dept-Issues-New/127004/> (last visited Oct. 16, 2011). A recent report on sexual assault charges at six Midwestern universities highlighting the difficulty of prosecuting sexual assault cases on campus may be behind the move to tighten the disciplinary rules at the universities. A survey of six schools revealed that 171 sex crime charges led to only four convictions. Prosecutors in this study cited difficulties arising from heavy drinking, lack of evidence of force, absence of witnesses, and unwillingness to press charges against fellow students with supporters on campus. See Todd Lightly et al., *Arrests, Convictions Rare in College Cases*, CHICAGO TRIBUNE, June 17, 2011. The Guidelines, however, raise many issues. Among them: on what theory does the federal government believe that it has to intervene in an area normally left to the states or to the schools themselves? Are the latter insufficiently mindful of the needs of women? Is it logical and healthy to have one evidentiary standard applicable to campus and another to the rest of our lives? What will happen when future lacrosse players are thrown out of school and later report disciplinary actions taken against them in applications for federal jobs and admissions to the bar? Will employers and others recall the difference in the evidentiary standards for sexual assault? Last, can we understand—without for a moment denying the great pain of sexual assault—that while sexual assault may be under-reported because of fear of ridicule or retaliation by the accused or his supporters, the psychological dynamics of sexual play are such that sexual assault is over-reported as well? See Eugene J. Kanin, Ph.D., *False Rape Allegations*, 23 Archives of Sexual Behavior 81, 83-85 (1994); Linda Fairstein, *Why Some Women Lie about Rape*, COSMOPOLITAN, Nov. 2003, at 102 (commenting on the variety of pressures on women that have led to false rape charges). Fairstein was formerly head of the sex-crimes unit in the Manhattan District attorney’s office.

The battle over evidentiary standards is not over yet. The august Association of American University Professors (AAUP) has just written a letter to the Department of Education protesting the new policy on academic freedom grounds. Its theory is that professors are often the accused in abuse cases. See Foundation for Individual Freedom in Education, *American Association of*

More malefactors will be expelled from schools under this standard, and that is to the good; but would the Duke accused have had any chance of justice under a lower evidentiary standard for complainants that trumpeted the special heinousness of sexual assault? Or under the standard at Princeton where guilt can be found if the woman is merely “under the influence” of alcohol?<sup>170</sup> Or the standard, in effect at Stanford, under which those judging the case are instructed that a “neutral stand” between complainant and accused is tantamount to siding with the abusive partner and that they should be “very, very cautious in in accepting a man’s claim that he has been wrongly accused of abuse or violence” because “[t]he great majority of allegations of abuse. . . are substantially accurate”?<sup>171</sup>

Happily, as if specially designed for this review, there is good news to report. At a talk I attended not long ago, one of the authors here threw out the number \$15,000,000 as the settlement amount in the Duke case. I understood that datum, which is not confirmed in the book or apparently anywhere else (presumably because of a secrecy clause), to be the total for the three students. I doubt it now. The Internal Revenue Service has just filed a tax lien against Reade Seligmann, one of the defendants, for back taxes of almost \$6,500,000.<sup>172</sup> If Seligmann had no other major source of income at the time, it would suggest that he alone walked off with some \$20,000,000.<sup>173</sup> Here is the “guarantee” of future students trying to hit the jackpot after more alcohol-inspiring stripping parties.

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*University Professors Asks Office for Civil Rights to Withdraw New Evidence Requirement*, THE FIRE UPDATE, Aug. 4, 2011 (citing the AAUP letter dated June 27).

170. See E-mail from FIRE, Foundation for Individual Freedom in Education, to Dan Subotnik, Professor of Law, Touro Law School, Jacob D. Fuchsberg Law Center (Aug. 12, 2011, 2:27 PM EST) (on file with author) (reporting the Princeton policy).

171. See Foundation for Individual Freedom in Education, THE FIRE UPDATE, July 20, 2011 (citing Stanford training materials). For a more comprehensive evaluation of the new regulatory regime for sexual activity on college campuses and, in particular, a harsh critique of the claim that 1 in 5 college women have been sexually assaulted or subject to an attempt at such, see Sandy Hingston, *The New Rules for College Sex*, PHILLYMAG.COM (Sept. 2011), available at [http://www.phillymag.com/articles/the\\_new\\_rules\\_of\\_college\\_sex/](http://www.phillymag.com/articles/the_new_rules_of_college_sex/) (last visited Oct. 16, 2011).

172. Nina Mandell, *IRS Claims Former Duke Lacrosse Player Reade Seligmann Owes Millions, Lawyer Says Bill is Mistake*, NYDAILYNEWS.COM (Feb. 25, 2011), available at [http://articles.nydailynews.com/2011-02-25/news/28647427\\_1\\_duke-lacrosse-player-irs-bill-tax-man](http://articles.nydailynews.com/2011-02-25/news/28647427_1_duke-lacrosse-player-irs-bill-tax-man) (last visited Oct. 16, 2011).

173. A number of race and gender critics in law school have argued that because of the pain inflicted by race and gender discrimination, recoveries should be treated as from “personal physical injury” under U.S. Internal Revenue Code Section 104 and thus be tax free. What an irony if Seligmann could have shown that he was targeted because of his race and thus received favorable tax treatment.

Recall now that in addition to these settled lawsuits, there are additional federal suits pending against Duke, the City of Durham, the prosecutor, the Duke president, and the police filed by both previously indicted and unindicted players. Inasmuch as the judge has just allowed a number of these suits to proceed, including some against the University and its president,<sup>174</sup> who knows? Whether or not Duke decides to settle, its total cost may well approach \$100,000,000.

This may be good, indeed great, news for Seligmann and the others, but, you will ask, what about for the rest of us? Being human, we can respond only with numbing envy at a payout this munificent. Here is the point. Brodhead's failure as an advocate for Duke notwithstanding, he was able—amazingly—to keep his presidency, a job he still holds. Now that the real costs of the debacle have come into view, will the next presidents be able to do so under similar circumstances? Will presidents be able to induce foundations, government agencies, and alumni to donate tens of millions of dollars not for science, medical research, or for a new stadium but rather to hush up a public relations fiasco? Not likely. Consciousness of the new realities should restore the honor of universities by helping presidents fight off—in appropriate places, one hopes—athletes, ethnic studies department members, alumni, race critics, Women's Studies professors, and other interest groups on campus who would make the university over in their own images.

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174. See Associated Press, *Judge Oks Former Duke Players' Suit*, ASSOCIATED PRESS (Mar. 31, 2011), available at <http://sports.espn.go.com/ncaa/news/story?id=6279040> (last visited Oct. 30, 2011).